Sovereign Choices: The CJEU's Ruling on Exit from Brexit

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Today's *Wightman* judgment from the Court of Justice of the European Union that a Member State may unilaterally revoke its notified intention to withdraw from the EU prior to that withdrawal taking effect risks falling foul of a Brexit news cycle in which each new twist and turn supersedes the last. Indeed the UK Prime Minister is understood to be announcing today a postponement of a House of Commons vote to approve the Withdrawal Agreement and Political Declaration negotiated between the UK and the EU. With the substance of the ruling more or less following last week's Opinion from the Court's Advocate General, the impact of the judgment is also somewhat reduced. However, the judgment contains significant messages for political and legal audiences.

To the political audience there is one enormous political message, and it is not so much a message about withdrawal as it is about membership.

The Court is clearly signalling that membership of the European Union, and the rights and responsibilities which come with it, is voluntary. States exercise their sovereignty to choose to join the European Union, and the Court emphasises that when states join the EU using the Article 49 TEU process they 'freely and voluntary' commit themselves to the values underpinning the EU. The discipline of EU membership – including acceptance of the primacy and direct effect of EU law – is something which states can accept voluntarily by joining, or reject voluntarily by leaving the EU. If a state decides to change its mind and not to leave but to remain a Member State, it must be free to do so voluntarily and can neither be coerced into leaving or be authorized to remain by the other Member States. In short, the Union is a voluntary association of sovereign and equal Member States. As political messages go, that is a pretty big message.

That big message also comes with a more specific message for the UK. If the UK were to decide to remain in the EU it would do so 'under terms that are unchanged as regards its status as a Member State'. Given that the UK's membership of the EU entails a range of opt-outs, these would not be up for renegotiation as a condition of remaining an EU Member State.

Aside from these important political message, the judgment also has something for EU lawyers and UK constitutional lawyers.

For EU lawyers, the decision is of significance not least in resolving a legal question that had been much debated in blogs and in journal articles (some of which are summarised in my earlier blog on this case). Despite well expressed reservations in some quarters that unilateral revocation might be used to game a withdrawal process or might otherwise risk moral hazards or abuse, the Court has come

down on the side of a contextual and historical interpretation of Article 50 TEU that emphasises the voluntary nature of the withdrawal process. Accordingly, unless and until a withdrawal agreement enters into force or the two-year withdrawal period – or an extended period – expires, a Member State remains free to change its mind and notify the European Council (in writing) of its unequivocal and unconditional intention to remain a Member State of the EU.

The ruling is also of interest to EU lawyers because of the willingness of the Court not only to deal with the case on an expedited basis – today's ruling comes barely more than two months from the request of the Scottish Court of Session for a preliminary ruling from the Court of Justice – but also because of the rejection of the UK Government's position that the referral was inadmissible. The Court was unwilling to accept that the presumption of the relevance of the question posed by the national court had been rebutted. In particular, the Court did not accept that there was no real dispute between the parties. Interestingly, once the Inner House of the Court of Session had determined that the case was admissible under domestic rules governing an application for judicial review and had rejected claims that a referral was inadmissible on grounds of being hypothetical or academic in nature, the Court of Justice appeared to be content with those assessments.

For UK constitutional lawyers, the *Wightman* ruling is also of some significance. While the UK Supreme Court in *Miller* had proceeded on the assumption that an Article 50 TEU notice could not be revoked we now know that this is not the position under EU law and no doubt some will speculate whether the clarification of the legal position would have led to a different result. However, the point remains that there are domestic constitutional requirements which must be met in order for the UK to leave the EU and as the Court of Justice tells us, these are also applicable to revocation of a notice of intention to withdraw from the EU. Indeed, the Court's safeguard against an abusive withdrawal of a notified intention to leave the EU is that a change of mind is subject to domestic decision-making procedures. Thus, any decision not to withdraw from the EU must – by analogy with the decision to withdraw in terms of Article 50(1) TEU – be in accordance with domestic constitutional requirements.

The Court of Justice has muddied the waters somewhat, however, by referring not just to the notification of an intention to revoke in accordance with domestic constitutional requirements but also to the Member State's decision 'to revoke the notification of that intention through a democratic process'. Two issues arise. Is the need for a 'democratic process' an additional EU law requirement, and what would a legitimate democratic process look like?

One way in which the Court departs from its Advocate General is that the Court does not demand that the notification of revocation meet EU requirements of good faith and sincere cooperation. In that light the reference to the democratic process could be viewed as a more concrete procedural demand of EU law intended to prevent an abusive exercise of the right to revoke at the whim of the executive, underscoring that the revocation notification has to be unequivocal and unconditional. However, the better view is that decisions to withdraw from the EU or stay a Member State remain sovereign matters for the Member States themselves and the domestic

constitutional and democratic procedures mandated. A decision in breach of those requirements, or requirements that did not ensure that a decision was unconditional and unequivocal would be cause for the EU to consider how to respond to withdrawal/revocation notifications, but otherwise it is not for the EU to mandate what those constitutional and democratic requirements ought to be.

All of which leaves open the question of what democratic requirements might be required by UK law. As we saw with the original Article 50 withdrawal notification, it may not be entirely apparent what rules UK law imposes. Phillipson and Young contend that an Act of Parliament would be required given that Parliament – in the European Union (Notification of Withdrawal) Act 2017 and the European Union (Withdrawal) Act 2018 providing for the UK's departure from the EU – would be frustrated by a revocation of the UK's Article 50 notice. A referendum prior to that decision would not necessarily be required although it could be undertaken if the UK so chose. But whether a referendum occurs or not is being driven by the somewhat chaotic domestic politics of Brexit rather than being a product of today's ruling. Indeed one way of reading today's judgment is that the best way of securing an unconditional and unequivocal decision to revoke the notified intention to withdraw from the EU is for the UK Parliament to legislate accordingly. If the political message of today's ruling is that the EU is a union of sovereign states, then the legal message is that it is up to the sovereign UK Parliament to decide whether the UK leaves the EU or remains a Member State.
